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Department of Health, Education and Welfare—Office for Civil Rights, Directory of Public Elementary and Secondary Schools in Selected Districts: Enrollment and Staff by Racial/Ethnic Group (Fall 1970) 2

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1970 Census 2

In the Supreme Court
OF THE
United States

OCTOBER TERM 1973

No. 73-434

WILLIAM G. MILLIKEN, et al., *Petitioners,*

vs.

RONALD G. BRADLEY, et al., *Respondents.*

No. 73-435

ALLEN PARK PUBLIC SCHOOLS, et al., *Petitioners,*

vs.

RONALD G. BRADLEY, et al., *Respondents.*

No. 73-436

THE GROSSE POINT PUBLIC SCHOOL SYSTEM, et al., *Petitioners,*

vs.

RONALD G. BRADLEY, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION OF THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND FOR LEAVE TO FILE BRIEF AMICUS CURIAE[1]

The Mexican American Legal Defense and Educational Fund (MALDEF) was established on May 1,

[1]The letter of consent from petitioners in No. 73-434, as well as the petitioners' letter not opposing a MALDEF filing in No. 73-435 and No. 73-436 have been filed with the Clerk. Respondents, Ronald Bradley, et al., having consented in a previous letter to MALDEF will doubtless so inform the Clerk anon. By oversight, the Respondent members of the Board of Education for the School District of the City of Detroit were not asked to consent.

1968, primarily to provide legal assistance to Mexican Americans. It is headquartered in San Francisco with additional offices in San Antonio, Los Angeles, Denver, Albuquerque, and Washington, D.C. Education litigation has long held a prominent place on the MALDEF docket. Echoing this Court in the *Brown* case, MALDEF recognizes the paramount importance of education in American life. A number of MALDEF cases involve integration, *see, e.g., Zamora v. New Braunfels Independent School Dist.*, 5th Cir. No. 73-2999 (pending), while a number of others are set in a metropolitan milieu, *see, e.g., Keyes and Congress of Hispano Educators v. School Dist. No. 1,* No. C-1499 (D. Col. Jan. 11, 1974) (MALDEF granted intervention of right on behalf of Mexican American plaintiffs in intervention on remand from this Court).

As the 1970 census clearly evidences, Chicanos and Spanish-speaking people, generically, are located in diverse geographical areas. While Detroit has not been the mecca of Latino migration, it does include approximately 4,000 Spanish-surnamed pupils in its schools. Department of Health, Education, and Welfare—Office for Civil Rights, *Directory of Public Elementary and Secondary Schools in Selected Districts: Enrollment and Staff by Racial/Ethnic Group* (Fall 1970). Moreover, there is every indication that Detroit has not met its constitutional obligation to provide an equal educational opportunity to Latinos. A cursory survey of the student-teacher ratios in Detroit public schools reveals egregious disparities:

	Student/Teacher Ratio
American Indian	1:13.8
Oriental	1:15.1
Anglo	1:15.7
Black	1:40.6
Spanish surnamed	1:101.5
Median	1:26.4

Source: *Id.*

The outcome of this case will have a substantial effect on the lives of a significant number of Latino children in Detroit who are currently deprived of an equal educational opportunity.

Respectfully submitted,

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February 1974

BRIEF FOR AMICUS CURIAE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

INTEREST OF AMICUS CURIAE

The interest of amicus curiae is set forth in the foregoing motion.

SUMMARY OF THE ARGUMENT

Children of metropolitan Detroit are denied equal educational opportunity because their schools are racially segregated. Since it is clear that state action has been at the root of Detroit's current segregation, this Court's instructions in *Keyes v. School District No. 1*, 93 S.Ct. 2686 (1973) should control the instant case; that is, it is an issue of fact whether or not Detroit is "separate, identifiable, and unrelated" to the remainder of metropolitan Detroit. Detroit is an integral part of the Detroit metropolitan area in which race is the only evident line of demarcation.

Segregation in Detroit has its genesis in the state: Michigan creates its school districts, and exercises great control over local school boards. The state has both acquiesced in segregative policies and taken an active affirmative role in nullifying integration efforts. School districts including more than one political unit are legion in Michigan while consolidation is commonplace.

While there is ample evidence of State segregatory action from which intent may be inferred as in *Keyes*,

the intent of the state authorities is not pivotal because state-created school district lines in Detroit have a racially segregative effect. It is evident that there is no compelling state interest for maintaining Detroit's racially exclusive boundary lines, because these lines were not sacrosanct in the past when they were crossed to further segregation and because boundaries have been abolished for a multitude of other educational reasons.

The state cannot now use school district boundaries to limit a district court's remedial powers where cross-district student assignments are necessary to achieve an effective and unitary school system. District courts are bound to consider only remedies that will achieve a unitary school system. Only plans that work in practice are constitutionally permissible. To that end, district courts have a wide latitude of tools available, but these must be used to achieve a unitary system. Whatever may be the limitations of a compelling state interest, these are certainly not transgressed where the state itself has consistently crossed district lines.

This Court has unwaivingly required lower courts to measure plans against a standard of effectiveness. The lower court has followed the admonitions of this Court in selecting the plan it felt would be most effective; anything short of a metropolitan plan would be futile and resegregative.

ARGUMENT

This desegregation suit presents questions concerning the equitable powers of the federal courts to give full and meaningful relief against the continued effects of *de jure* school segregation, when that relief requires crossing lines drawn by the state government responsible for the segregation. In this case, the petitioners were ordered by the District Court below to prepare a desegregation plan which would not be limited, in scope or effect, to the inner city schools of the metropolitan Detroit area but which would encompass schools located throughout the Detroit metropolitan area for the purpose of creating a unitary integrated school system. In reaching that decision, the District Court found that system wide segregation in Detroit city schools was the result of unconstitutional acts by the State and that no desegregation plan limited to Detroit could create a unitary integrated school system. The Court of Appeals affirmed. Since no specific remedy was ordered by the courts below, the precise question to be determined is limited: May a federal district court order consideration of a desegregation plan involving cross-district student assignments, within a single metropolitan area in a single state, when the court has found that unconstitutional segregation exists in the inner city schools of the metropolitan area, and that the relief involving those schools alone can remedy the unlawful segregation. In this brief we take the position that the decisions of courts below were eminently sound—indeed they were mandated by the principles contained in decisions of this Court—and that they should be affirmed.

I.

THE CHILDREN OF METROPOLITAN DETROIT ARE DENIED EQUAL EDUCATIONAL OPPORTUNITY BECAUSE THEIR SCHOOLS ARE RACIALLY SEGREGATED.

"Separate educational facilities are inherently unequal." *Brown v. Board of Education*, 347 U.S. 483, 495 (1954). "To separate [black students] . . . generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . . Segregation with the sanction of law, therefore, has a tendency to [retard] the education and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system." *Id.*, at 494.

We submit that at the heart of the *Brown* principle is what Edmond Cahn once labeled as the "consumer perspective," Cahn, *Law in the Consumer Perspective*, 112 U. PA. L. REV. 1 (1963); Cahn, THE PREDICAMENT OF DEMOCRATIC MAN (1961). The "consumer perspective" simply insists that the most valid judgment which can be given about institutions is given by those people whom they are intended to serve—*i.e.*, the "consumer" of that institution's services; in this case, minority students of segregated schools.

If schools are identifiably "minority" or "white," if they are more than "just schools," *Green v. County School Board*, 391 U.S. 430, 442 (1968), the injury so zealously to be guarded against under *Brown* occurs. The indentifiability of schools, together with the resultant injury occasioned by them, is largely a matter of a child's perception. If a child can say

(or see or feel) "This is one of Detroit's minority schools—and this is one of Detroit's Anglo schools," the school is, within the meaning of *Brown* and its progeny a segregated school.

Given the factual context of this case, a child attending any metropolitan Detroit school knows whether his or her school is an Anglo one or a minority one. He or she also probably lives within a half hour of the center of the city. Either his or her parents or his or her neighbor's parents work within the city limits. No matter where he lives in the metropolitan area, the child may go to a hospital in the center of the city if he is ill, and his parents are likely to go into the city center for entertainment. The child will learn about his world from the metropolitan newspapers, television and radio, none of which limit themselves to "Detroit only" or "suburban only" news coverage. There are few definite natural geographical boundary lines which divide up the city, and what lines exist are casually crossed by metropolitan areas citizens daily. The cohesiveness of the metropolitan area is further evidenced by the state's creation of the Metropolitan Detroit Water System, the Metropolitan Sewage System, the Huron-Clinton Metropolitan Port Authority and its creation of intermediate school districts which provide educational services on an interdistrict basis within the metropolitan area.

In *Keyes v. School District No. 1,* 93 S.Ct. 2686 (1973) this Court was asked to consider whether a district court erred in requiring evidence of segregation in every part of a city in order to prove a case

of district-wide segregation. This Court emphatically rejected the lower court's standard, and reversed holding that where there is evidence of segregation in a city, the burden then shifts to the defendants to show that the remainder of the city is not tainted by the infection. 93 S.Ct. at 2697. It is nearly a tautology to say that if one area of a city is black the other areas must be racially affected in that they are more white. *See* 93 S.Ct. at 2695. On remand the lower court considered evidence of *inter alia,* transportation patterns, water services, and sewage services in order to determine whether the Park Hill area of Denver was geographically separate from the remainder of Denver. In painstakingly following this Court's instructions, Judge Doyle found that Park Hill was not a self-sustaining enclave but was integrally related to Denver as a whole:

> . . . [P]laintiff's evidence established that the Park Hill area is not treated differently from the surrounding areas with respect to the provision of fire and police protection, water supplies and sewage.

Keyes v. School District No. 1, No. C-1499 (D. Col., Dec. 11, 1973).

This Court chafed at the thought of a "separate, identifiable, and unrelated" portion of a district and commented that such phenomena "must be rare." 93 S.Ct. at 2695. This Court further held that "such a determination is essentially a question of fact to be resolved by the trial court in the first instance . . ." 93 S.Ct. at 2695. Similarly, the trier of fact in the

instant case has established that the City of Detroit is not a "separate, identifiable, and unrelated" portion of the Detroit metropolitan area. The respondents in the instant case have sought to remove the state imposed artificial political barriers to a unitary system.

The only clear physical demarcation between various parts of the metropolitan area is that schools for people living near the center of the city are predominantly minority and schools for people living further away are predominantly Anglo; or, to put it in terms of the child's perspective—people living near the center attend "minority" schools, and people living further away attend "Anglo" schools.

The population of the metropolitan Detroit area is approximately 25% minority and 75% Anglo. If a child were in a school with a similar proportion of minority and Anglo students, he would not perceive it as "minority" or "Anglo" but as reflecting the metropolitan Detroit society in which he lives. Thus, if we assume that only schools with student bodies of 15-40% minority would reflect Detroit society and thus would not be identifiable by the child as an "Anglo" school or a "minority" school, most of the schools in the metropolitan Detroit area are identifiable by them as "minority" or "Anglo." The social cohesiveness of the metropolitan area and physical proximity further assure such identification.

When almost every school in an area can be seen to be a "minority" or "Anglo," it is obvious that the schools are segregated. That this segregation is caused

by the state's maintenance of evanescent boundaries does not alter the child's perception, his injury or the segregation. For almost two decades this Court has recognized that "Separate educational facilities are inherently unequal." *Brown v. Board of Education, supra,* 347 U.S. at 495.

II

THE STATE OF MICHIGAN HAS DENIED PLAINTIFFS THE EQUAL PROTECTION OF THE LAWS

A. The State Has Created the Segregated School System.

The state defendants do not challenge the lower court's finding that the present segregation in Detroit public schools resulted from such practices of the Detroit Board of Education as: segregative zoning and assignment practices, formulation and modification of attendance zones to perpetuate segregation, segregative transportation of students (both by busing minority students to minority schools often past available Anglo schools and by following "intact transportation" plans which resulted in all minority classes in predominantly Anglo schools), maintenance of "optional attendance" zones and "school feeder" plans that perpetuated or exacerbated racial segregation, and segregative school construction policies which resulted in most new schools opening as one-race schools. These findings are amply supported by the record, as evidenced by the state's failure to challenge them, and are sufficient to establish the duty to de-

segregate the dual school system and to convert to a unitary system. See the Circuit Court's findings as to these practices in the Appendix at 118a-15a. *Cf., Keyes v. School Dist. No. 1,* 93 S.Ct. 2686 (1973); *Swann v. Charlotte-Mecklenburg Brd. of Educ.,* 402 U.S. 1 (1971); *Green v. School Board,* 391 U.S. 430 (1968).

The state defendants challenge the lower court's power to remedy the unconstitutional segregation by utilization of a desegregation plan involving cross-district student assignment. These petitioners seek to insulate themselves from the remedial power of the federal court by denying that any party save the Detroit Board of Education is responsible for the unconstitutional segregation and by suggesting that any remedial order must therefore be limited in scope to affect only those schools located within the school district administered by the Detroit school board. Both assertions are erroneous.

To suggest, as do the state defendants, that they are not legally responsible for the segregation in Detroit, and that the scope of the remedy in this case must be limited in effect to Detroit ignores the pervasive control that the state has, and exercises, over education in Michigan, and moreover, ignores the state's segregatory intent which is evidenced by the state's exercises of that power in the past.

State law creates and defines the boundaries of cities and counties. Such boundaries are often useful for the administration of many matters, but they need not coincide with school division boundaries. In fact, there are a number of school divisions which include

several political units in Michigan, and Michigan law permits the State Board to consolidate school districts even if consolidation overlaps such political lines. Indeed in Michigan, from 1964 until 1968, 700 Michigan school districts were consolidated for all sorts of educational and financial reasons, many by direct order of the State School Board without regard to local school board desire or approval. *See* Circuit Court opinion, Appendix at 167a-69a. Metropolitan school districts overlapping political lines are not uncommon elsewhere. For example, the City of Charlotte, North Carolina, and the County of Mecklenburg comprise a single school system. *See Swann v. Charlotte-Mecklenburg Brd. of Educ.*, 402 U.S. 1 (1971).

The State of Michigan has permitted interdistrict school attendance plans in the past and it exercises a pervasive control over the affairs of the local school boards, both directly, *e.g.*, by requiring state approval of textbooks, and indirectly, *e.g.*, by exercising a power of review and veto over local board decisions. *See* Circuit Court opinion, Appndix at 165a-72a. Of course, many decisions are delegated to the local boards, for administrative convenience. To the extent that the State has delegated to local officials the power to determine the boundaries of the administrative units for schools, the exercise of those powers is still the State's responsibility and they must be exercised in conformity with the State's constitutional obligations. Regardless of the legal mechanism, the result of that exercise of power in this case is clear—segregated schools. Having created a segregated school

system and having refused to exercise its power in a manner that would desegregate it, the State of Michigan has violated its constitutional duty under the Fourteenth Amendment.

The instances of the unconstitutional acts of the Detroit School board are obviously chargeable to the State Board of Education, which controls the Detroit Board. Indeed, the very school construction policies which were found to exacerbate segregation in Detroit schools were subject to the approval of the State Board. The state board acknowledged this control when it published its 1966 Joint Policy Statement and the School Plant Planning Handbook containing an express admonition to local boards to consider racial balance as one of the factors in selecting new school sites or constructing schools. (PX 174, Va. 13.) Petitioners seek to avoid this obvious conclusion by suggesting that local school boards have plenary power to assign pupils and design attendance zones within their districts, and that the state has no responsibility for the results of these actions. The record bears no support for such an assertion.

What the record evidences, with respect to the metropolitan Detroit area, is that the state afforded local boards great power to draw attendance zones and student assignment plans, but only for so long as those powers were exercised in a segregatory manner. Thus, in April, 1970, the Detroit school board adopted a modest plan to effect desegregation in Detroit. Three months later, the State legislature enacted Public Law 48 which served to "impede,

delay and minimize racial integration in Detroit schools" (District Court opinion, Appendix at 28a) by effectively nullifying the plan of the Detroit school board. This state power over local school board decisions, of course, has been recognized, by Michigan law, to inhere in the state, as the Circuit Court properly concluded in its opinion below:

> . . . Michigan has always regarded education as fundamental business of the State as a whole. Local school districts are creatures of the State and act as instrumentalities of the State under State control.

Circuit Court opinion, Appendix at 167a (citations omitted).

Petitioners suggest that the action of the state in enacting Public Law 48 is irrelevant here because it "had no causal connection with the distribution of pupils." (Petitioners' Brief in No. 73-434 at 41.) This misses the point of the proof. The state has asserted that lack of proof of its affirmative involvement in past decisions of the local board, that have been found to have led to segregation, coupled with its delegation of certain powers to local board defeats any attempt to place responsibility for resulting segregation on it. But enactment of Public Law 48 effectively undermines the state's position.

It may be true that the local agents of the state were often permitted to reach their own decisions without state interference. But the reason for leaving them alone was not lack of power in the supervisory agency, or lack of knowledge as to the probable

segregatory effects of those actions. Rather, past acquiesence is only explicable, given the state's actions in enacting Public Law 48, because the state approved, and desired, the resulting segregation. As was said of the Denver school board, and as is no less the case here with respect to the past acts of the state of Michigan: "A finding of international segregation in one portion of a school system is highly relevant to the issue of the board's interest with respect to the other segregated schools in the system." *Keyes, supra,* 93 S.Ct. at 2697. The courts below properly weighed this evidence in concluding that the state, as well as the city was legally responsible for the segregation in Detroit schools.

The question in this case, therefore, is not whether state action has resulted in a segregated school system —that clearly has occurred. Rather, the question is, having acted in such a manner as to segregate the races in fact, can the state demonstrate justification of a sufficiently compelling nature to excuse the effects of its actions? If such justification does not exist, then the school system is segregated within the meaning of *Brown* and the equity powers of the District Court below were properly applied to remedy the resultant segregation.

B. The School Boundary Lines Are Unconstitutional Because They Operate to Discriminate on the Basis of Race and Are Not Justified by a Compelling State Interest.

Sometimes there are no obvious criteria for drawing lines, yet it is still useful to draw a line. This is true of the school boundary lines in the

Detroit area. There are no natural geographical boundaries dividing the area, and the lines which are imposed are flexible and subject to constant change through consolidation proceedings. These lines are drawn to facilitate various political and social functions. But the criteria on which the lines are based are arbitrary. Such arbitrary lines are properly viewed with suspicion when their effect is to disadvantage blacks and Latinos. Thus, courts have not permitted school attendance lines to be drawn around a residentially segregated neighborhood when other attendance zones are just as feasible. *Brewer v. School Board of City of Norfolk,* 397 F.2d 37 (4th Cir. 1968). Even attendance zones which follow natural or historical boundaries have been struck down when they operate to separate the races. See *Henry v. Clarksdale Municipal Separate School District,* 409 F.2d 682 (5th Cir.), cert. denied, 396 U.S. 940 (1969); *United States v. Greenwood Municipal Separate School District,* 406 F.2d 1086 (5th Cir.), cert. denied, 395 U.S. 907 (1969); *Clark v. Board of Education of Little Rock,* 426 F.2d 1035 (8th Cir. 1970); and *Monroe v. Bd. of Comm'rs of City of Jackson, Tenn.,* 427 F.2d 1005 (6th Cir. 1970). See also *Davis v. Board of School Commissioners,* 402 U.S. 33 (1971).

Although the foregoing is adequate evidence of state action from which intent may be inferred as in *Keyes,* if the effect of districting is racial segregation and the justification is weak, there is no need to probe the psychological motivation of the legislature to determine whether there was in fact a conscious racial

purpose. Anyone involved in such a classification will readily perceive that they are treated unequally, and courts will agree with that perception. See *Jackson v. Godwin,* 400 F.2d 529 (5th Cir. 1968); *Hawkins v. Town of Shaw,* 437 F.2d 1286 (5th Cir. 1971).

This Court has construed statutes prohibiting racial discrimination in voting and employment from this perspective. See *Gaston County v. United States,* 395 U.S. 285 (1969). In *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971), an employer used a standardized test for hiring and promotion decisions. The district court found there was no racial purpose or invidious intent in adopting the test although the Anglos tested generally did better than blacks; by a divided decision the Fourth Circuit Court of Appeals affirmed. Nevertheless, this Court found that the use of the test violated Title VII of the Civil Rights Act of 1964 which made it unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive . . . any individual of employment opportunities . . . because of such individual's race." The Court ruled that an employment test could be used only if it was in fact related to performance of the job, and that the employer's motive in using the test was not the significant question.

The issue in cases of racial discrimination thus at least becomes whether the classification or boundary line that operates to discriminate against minorities is justified by a compelling non-racial state interest. See e.g., *Loving v. Virginia,* 388 U.S. 1, 9 (1967); *McLaughlin v. Florida,* 379 U.S. 184 (1964).

In the instant case, when the effect of districting is considered, and when Michigan's professed "justifications" are weighed to determine their compelling nature, it becomes clear that ordering cross-district education of students within these school districts is not beyond the remedial powers of a federal district court. Whatever the State of Michigan's interest in maintaining students in schools located only within the school boundary lines of the place of residence, it has no compelling interest in utilizing those lines for school administrative zones which result in segregated schools.

First, the State ignored boundary lines to implement its earlier policy of segregation. During this period, many Michigan children were bussed across school district lines because the nearest school of their race was located in another district as in the case of the Carver school children. *See* Circuit Court opinion, Appendix at 152a.

Second, school boundary lines have often been ignored in the past to further other educational purposes. From 1964 to 1968, the number of Michigan school districts decreased from 1438 to 738, pursuant to a statutory scheme designed to require all districts to operate as K through 12 systems. Other examples include consolidation for financial purposes.

The historic practice of combining several political subdivisions into one school division and in consolidating school districts for diverse reasons demonstrates that there is no compelling state interest in maintaining separate school districts and that the State of

Michigan has not in the past considered the reasons offered in this case to be "compelling." The state asserts, as an additional reason, the state's interest in "local control" over schools, citing as authority, this Court's decision in *San Antonio ISD v. Rodriguez,* 411 U.S. 1 (1973), which held a state's interest in local control of education to be sufficient to justify interdistrict disparities in financing. Of course, *Rodriguez* is inapposite since it did not involve a racial classification. Hence, proof of "rational", rather than "compelling" justification over the disparities in *Rodriquez* was deemed sufficient. But this case is a case involving a racial classification. Indeed, *Rodriguez* is inapplicable for yet another reason. The interest in local control asserted by the state here is incredible given the record of state control over education. *Cf.* Circuit Court Opinion, Appendix at 167a. Indeed, this principle of "local control" apparently was not deemed peremptory when the state overruled the Detroit school board's desegregation action in 1970. Moreover, until details of the metropolitan plan are formulated and approved it is difficult to assess its effect on local control, since many variants of cross-district attendance plans are compatible with local control. One thing is clear, however: since there is no compelling reason to maintain these school boundary lines which separate children by race, they should be struck down.

C. The State Cannot Use School District Boundaries to Limit a District Court's Remedial Powers Where Cross-District Student Assignments Are Necessary to Achieve an Effective and Unitary School System.

It is difficult to discuss the appropriateness of the contemplated remedy in this case because no specific plan has yet been approved. Discussion must, perforce, be limited to a general proposition, i.e., whether, a district court may consider a metropolitan desegregation plan. In discussing the problem, it is important to focus on what is not in issue as well as what is in issue. First, no specifics as to costs, transportation time or distances, number of students involved, etc., can be discussed because these factors are not yet known. In fairness, it must be assumed that the District Court will reject any plan which involves excessive additional costs, or, if all plans do so, that it is still possible that no metropolitan plan can be, or will be, ordered. We are left then with the following proposition for discussion: May a district court consider a desegregation plan involving cross-district student assignment at reasonable cost of time and money, in order to desegregate a dual system, if the only alternative to such cross-district assignments is implementation of a remedy which can be expected to result in an artificially bounded all-black school system surrounded by equally artificially bounded all-white school systems? We argue below that the lower courts were correct in concluding that a district court may consider such a remedy.

Ever since the 1968 decision in *Green v. School Board,* 391 U.S. 430 (1968), clarified the duties im-

posed on school boards, there has been no doubt as to the goal to be achieved in desegregating a dual school system. The goal was, and remains, to convert to a "unitary school system." And where a school system fails to achieve this goal, it is within the remedial power of federal courts to order implementation of plans designed to achieve it.

In defining the scope of the remedial powers of a district court and in seeking guidance as to the proper and necessary exercise of that power ". . . words are poor instruments to convey the basic fairness inherent in equity. Substance, not semantics, must govern . . .". *Swann, supra,* 402 U.S. at 26 (1971). No definition of a "unitary school system" will suffice to govern all the conceivable factual patterns presented by the, literally, hundred of school cases decided annually. No "per se" rules can be fashioned which will serve as a panacea for every conceivable problem that may arise in every case. Despite these difficulties, however, some requirements of a pupil desegregation plan are quite clear, objective and unambiguous. Against these, as a minimum, any plan must be measured for sufficiency.

1. The Goal.

The most important consideration for any plan is the goal to be achieved—a "unitary school system". Any plan which is calculated or can be predicted to fail in achieving that goal is beyond constitutional redemption, whatever savings of costs and inconvenience it may achieve. A plan, at a minimum must

"promise to work realistically to convert promptly to a system without a 'white' school and a system without a 'negro' school, but just schools." *Green, supra,* 391 U.S. at 442. Or, as this Court rephrased the same goal in *Swann*: ". . . the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation. . . ." *Swann, supra,* 402 U.S. at 26.

Especially to be noted in the last passage is the emphasis on the word "possible." Obviously, possibility is a function of the tools available. What then are the tools or methods available to courts in achieving "the greatest possible degree of actual desegregation"?

2. Methods Available to Achieve Unitary Status.

Although references exist elsewhere, this Court spoke most fully about the methods to be used in achieving desegregation in *Swann.* Little can be added to the Court's description of those methods:

a. *attendance zones*—"a frank—and sometimes drastic—gerrymander of school districts and attendance zones" resulting in zones "neither compact nor contiguous; indeed they may be in the opposite ends of the city." *Id.,* at 27.

b. *racial attendance criteria*—"pairing; clustering; or 'grouping' of schools with attendance assignments made deliberately to accomplish the transfer of Negro students out of formerly segregated Negro schools and transfers of white students to formerly all-Negro schools." *Id.,* at 27.

c. *transportation*—"Desegregation plans can not be limited to the walk-in school." *Id.*, at 30.

d. *administrative convenience*—"But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient and even bizarre in some situations and may impose burdens on some . . . ." *Id.*, at 28.

Any plan must consider all these available methods, in light of the goal to be achieved. Failure to consider these methods or failure to utilize them or refusal to accept one of two alternatives because one does and the other does not utilize them, except where the choice is dictated by a compelling state interest is a clear failure to discharge the constitutional obligation. The availability of "more promising courses of action" to dismantle a dual school system "at the least places a heavy burden upon the board to explain its preference for an apparently less effective method." *Green*, 391 U.S. at 430; *Wright v. Council of City of Emporia*, 407 U.S. 451, 467 (1972). If the failure is on the part of the district court, it would require remand for their consideration and utilization. *See, e.g., Adams v. School Dist. No. 5*, 444 F.2d 99 (4th Cir. 1971). In short, within the context of the goal to be achieved, and in light of all the methods of achieving it available to the district court, the court's discretion is limited to exploration of all techniques

and utilization of those which best achieve that goal, absent the limitation of a compelling state interest:

> But the discretion the Court vests in the district court goes only to the question of how integration shall be achieved—the details of the remedial plan (such as what schools shall be paired for the transportation program). The lower court has no discretion to alter or disregard the central remedial obligation— achieving the greatest degree of school desegregation—and the plan it approves will be measured by that stringent standard.

Fiss, *The Charlotte-Mecklenberg* case, 38 U. Chic. L. Rev. 697, 702 (1971).

Indeed, Professor Fiss's analysis best explains the result in *Davis v. Board of School Commissioners*, 402 U.S. 33 (1971), a companion case to *Swann*. There, this Court rejected a plan that had been adopted, but which allowed a residue of segregation. Elimination of that residue required assignment of students across major highways, which, to the district court and the Fifth Circuit presented a sufficient practical barrier to constitute a "compelling" justification for the board's failure to achieve greater desegregation. The case was remanded for consideration of the use of bus transportation and split zoning.

3. One Race Schools.

In addition to the foregoing, any plan must eliminate schools which are virtually one race schools as a result of past action on the part of the school authorities.

> The district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools . . . [i]n a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition. Where the school authorities' proposed plan . . . contemplates the continued existence of some schools that are all or predominantly of one race . . . the burden upon school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.

Swann, supra, 402 U.S. at 26.

4. Limitations of Compelling State Interests.

There are, of course, limits on utilizing these methods to achieve a unitary school system—as, indeed, there may be times when a proper exercise of discretion would counsel foregoing their use. But these limits and their application must be tested by the traditional "compelling state interest" test common to racial discrimination cases. *Cf., Loving v. Virginia,* 388 U.S. 1 (1967); *McLaughlin v. Florida,* 379 U.S. 184 (1964). Again, *Swann* itself is the best source for consideration of these limitations.

For example, in discussing the use of transportation, the Court noted that busing is now used ex-

tensively and that busing can not be considered undesirable simply because the destination is an integrated rather than a segregated school. It is only when the state establishes a compelling interest in not utilizing a particular proposed transportation plan that it ought to be rejected. Or, restating the proposition in the Court's language, when the state proves that a proposed busing plan would "either risk the health of children or significantly impinge on the educational process" *Swann, supra,* 402 U.S. at 30-31, that plan can properly be disregarded by the District Court.

The "compelling interest" doctrine may, to some extent, itself be ambiguous. It is clear, however, that it requires a good deal more showing than does the traditional equal protection test of "reasonableness" or "balance of the hardships" that is in ordinary equal protection cases. *See, Shapiro v. Thompson,* 394 U.S. 618 (1969) for discussions of the proper standards, in both the majority and dissenting opinions. *See also, Cipriano v. City of Houma,* 395 U.S. 701 (1969); *San Antonio Ind. Sch. Dist. v. Rodriguez,* 93 S.Ct. 1278 (1973) and the dissenting opinion of Judge Sobeloff in *United States v. Scotland Neck City Brd. of Educ.,* 442 F.2d 575 (4th Cir.) *rev'd,* 407 U.S. 484 (1972). Illustrative of the compelling state interest doctrine's operation in school desegregation cases are the facts in *Swann.* The additional annual transportation operating cost of busing for desegregation was $1,000,000 imposed on a budget of $100,000,000, and the longest rides were 35 minutes.

Clearly a plan calling for less expenditure (in proportion to the school district's pre-plan budget) and for trips not in excess of 35 minutes does not present a compelling state reason for disregard of that plan if it is the one which most effectively desegregates the school system. *See Brewer v. School Board*, 397 F.2d 37 (1968); 456 F.2d 943, 946, n. 6 (4th Cir. 1972) for cost and mileage figures in other cases.

The state's interest in forbidding cross-district student assignments for desegregation purposes in a case arising in a state in which cross district assignments are commonplace and where nearly half of all districts have been consolidated in the recent past for all sorts of educational and financial reasons is hardly a "compelling" interest. *See* discussion, *supra*.

5. Effectiveness.

Perhaps the single most important measure of the adequacy of a desegregation plan is its effectiveness. "The mandate of *Brown II* was to desegregate schools, and we have said that '[t]he measure of any desegregation plan is its effectiveness'". *Wright v. Council of City of Emporia*, 407 U.S. 451 (1972). *See also* the companion case to *Wright, United States v. Scotland Neck City Brd. of Educ.*, 407 U.S. 484 (1972). The test of effectiveness can best be described in the terms this Court has used to explain it:

> In *Green*, supra, this Court used the term 'feasible' and by implication 'workable', 'effective' and 'realistic' in the mandate to develop 'a plan that promises realistically to work. . . .

Swann, supra, 402 U.S. 21.

Clearly, then, when a district court reviews alternatives presented to it, a prime consideration is the relative effectiveness of the alternative plans to achieve, in operation, the goal of a desegregated unitary system. But the measure of effectiveness is not limited to "paper" effectiveness. The plan must not only appear effective; it must work in fact. Therefore, district courts are charged with the duty to retain jurisdiction of any desegregation case for a sufficient period of time to assure that the plan selected, in operation and in fact, achieves a stable, desegregated unitary school system. *Raney v. Board of Education*, 391 U.S. 443, 449 (1968).

One real danger in adoption of any plan is that the plan might to so structured as to leave in existence substantial pockets of racial isolation. When this occurs, a natural and probable consequence of that plan will be resegregation, *i.e.*, continuation of a dual system in different form. People in the past have moved in order to isolate their school children racially, and they will continue to do so, as long as any desegregation plan gives them a real option to move from a pupil assignment area for an integrated school to an assignment area for a segregated school within the same cohesive metropolitan area. "People gravitate toward school facilities just as schools are located in response to the needs of people." *Swann, supra*, 402 U.S. at 21.

Hence, the emphasis in *Swann* is on the elimination of all or nearly all disproportionately one race schools. When a plan which looks effective on paper

fails because it is doomed to failure from the start, further litigation and relief become necessary. Discretionary choice of a plan which bears the seeds of its own failure because it is cheaper or more minimal is a poor choice:

> . . . [a] desegregation plan cannot be regarded as a proper exercise of a district court's discretion where it is not reasonable, feasible and workable. . . .

Wright, supra, 407 U.S. at 468-69.

The *Wright, supra,* and *Scotland Neck, supra,* cases pose analogous problems to those present in this case. In each, this Court reversed the Fourth Circuit which had permitted both school districts to adopt plans calling for creation of two school systems where there had previously been but one. The analogy to intradistrict establishment of exclusive attendance zones is both obvious and complete. In *Wright,* the plan envisaged creation of two districts, one of which was 52% black and the other 72% black. The alternative (and original plan) would have resulted in a single district which was 66% black. The Court refused to countenance this alternative plan because of its probable and natural effect. Erection of new boundaries where no such lines previously existed, occurring in a district where a dual school system had long flourished, "must be judged according to whether it hinders or furthers the process of school desegregation. *Wright, supra,* 407 U.S. at 460. The Court summarized the effect it feared by quoting from Judge Winter's dissenting opinion in the Fourth Circuit:

> . . . [i]f the establishment of an Emporia school district is not enjoined, the black students in the country will watch as nearly one-half the total number of white students in the country abandon the county schools for a substantially whiter system.

Wright, supra, 407 U.S. at 466.

In a similar case, an adopted plan was remanded to the district court for consideration of suggested modifications proposed to avoid foreseeable resegregation problems allegedly inherent in the adopted plan. *Harrington v. Colquitt Co. Brd. of Educ.,* 450 F.2d 1113 (5th Cir. 1971). *See also Swann v. Charlotte-Mecklenberg Brd. of Educ.,* 334 Supp. 623 (W.D.N.C. 1971), where Judge McMillan addressing this problem, imposed a requirement that the adopted plan prevent resegregation:

> The principal question now raised about the feeder plan is not the present pupil distribution per se . . . Rather, the principal question is whether the schools will or can remain desegregated—whether the plan is likely to be reasonably stable in practice . . . if the plan shows no promise of keeping the schools reasonably stable, the adoption of the plan may . . . be only an exercise in statistics and map making.

Id. at 627.

To avoid the futility of engaging in a mere "exercise in statistics and map making," and to avoid constant relitigation over the same school district, choices between alternatives must obviously take into account potential instability due to the existence of pockets

of racial isolation. In short, both law and common sense require that effect, in operation, be a major factor in making a choice.

These principles govern the instant case. The District Court findings, which were affirmed by the Circuit Court, show that limiting relief to Detroit city schools would be futile. It would not result in unitary schools, rather within a very short time it would result in the very same pattern that now exists—minorities in the metropolitan Detroit area would attend virtually all minority schools and Anglos in the same metropolitan area would attend virtually all Anglo schools. Given those findings, to suggest that consideration of a metropolitan remedy is an abuse of discretion evidences real misunderstanding of the principles of school desegregation cases.

CONCLUSION

The order of the trial judge demonstrates that feasible and effective desegregation may yet be implemented in the Detroit metropolitan area. The area involved is not so obviously great nor is the additional transportation so obviously significant as to hamper the education process if this Court affirms the orders below. Indeed, it is noteworthy that the strongest resistance to this order comes from the suburban districts (the City of Detroit is a respondent) where busing is commonplace because of the lower population density. But State-created segregation should not be tolerated, especially where its justification lies in

arbitrary lines whose specific location serves only to mark off areas according to race. Nor should the mandate of the Constitution be circumvented because of any public outcry over court orders. See *Cooper v. Aaron*, 358 U.S. 1 (1958).

Respectfully submitted,

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February, 1974.